MICHIGAN SUPREME COURT

PUBLIC HEARING
JANUARY 29, 2004

JUSTICE CORRIGAN: Good morning. On behalf of my colleagues I welcome you to the Michigan Supreme Court's public administrative hearing to consider various court rules proposals and proposals regarding administrative orders. At this morning's hearing, those who have signed up to speak will be limited to 3 minutes in which to make their remarks. I would counsel everyone not to be repetitive of what the speaker before has said. Make your points. The Court has reviewed the written documents and the Court intends to conclude this hearing at 11:30 promptly as we have many other matters to take up today in our conference. In addition I wanted to alert you that regarding Item 9, that item will be considered last today. There are many people signed up to speak so for the sake of being efficient this morning, we will consider all the other items before we take up item 9. That being the case, there are no speakers signed up on our Item #1 regarding the amendment of Rule 7.202 of the court rules.

Item 2: 2001-51: MRE 404 DOMESTIC VIOLENCE

JUSTICE CORRIGAN: The next item up is the proposed alternative amendments of Rule 404 of the Michigan Rules of Evidence. That is, should the Court amend Rule 404 with respect to the admissibility of prior acts of domestic violence and the hearsay statements of a complainant-declarant. The first speaker I have listed is LaVone Sipka. Is that person present? Come forward, please. Just so you understand, ma'am, the yellow light means you're within your first minute, and when the red light comes on you'll stop.

MS. SIPKA: Okay. I think I'll probably be stopping before then. I'm LaVone Sipka and good morning. I have some very strong ideas when it comes to prosecution of abusers and the primary reason I came is because I feel very strongly the institution of a national domestic abuse registry like we have with the sex offenders. And of course the public should have access to this and hopefully this would allow people who are perhaps are marrying for the first time or remarrying to access this registry.

JUSTICE CORRIGAN: Ms. Sipka, let me ask you ma'am, do you have comments regarding this rule of evidence that we want to consider this morning. Are your comments related to that because it sounds like what you're talking to us about is regarding something that the Legislature needs to take up.

MS. SIPKA: Oh, beyond this.

JUSTICE CORRIGAN: Yes. You need to talk to your local legislator about that proposal.

MS. SIPKA: Okay. Back on past histories. Yes, I think there should be--I guess I have to say I am a victim and I've recently learned that past history would have been very important in my case as well as the issue of hearsay when it comes to motives or planning involved. These are things that should be considered.

JUSTICE CORRIGAN: Very well. Anything further?

MS. SIPKA: No, that's all I have and thank you.

JUSTICE CORRIGAN: Thank you for coming today. Justices, do you have any questions? Thank you. The next witness is David Morse.

MR. MORSE: Morning members of the Court. My name is David Morse. I'm prosecuting attorney for Livingston County and I'm here on behalf of the Prosecuting Attorneys Association of Michigan. I'll try to be brief here. Speaking as a frontline prosecutor, most cases of domestic violence are, of course, committed not where witnesses can see and usually there are no other witnesses other than the defendant and the victim. They are usually committed in private and in domestic violence cases we were often finding that the conduct of the victim is almost always an issue because the victim's conduct often seems to be to the trier of fact illogical or irrational under the circumstances. Victims may not report immediately. They may in fact talk to the police when they arrive about not make an arrest after having reported the incident. They do not want to leave the relationship. They may even appear to be the aggressor in some circumstances. The reason for that is because of the prior conduct, the prior behavior of the defendant. The trier of fact is merely looking at a single incident, a single crime charged, and can often mistake the conduct or the failure of the victim to act in a seemingly logical matter as evidence that the victim isn't reliable or they're not credible and therefore that the crime did not occur. However, these domestic violence incidents rarely occur in a vacuum and they almost never occur as a single event. Domestic violence is a process, it is one of love, tension and violence. As a result, domestic violence victims usually behave in ways that seem incredible to a trier of fact when viewed in light of a single incident. The victim's conduct will gain credibility when it's viewed in the context of the entire relationship. The past conduct of the defendant puts the victim's conduct in perspective. Now I understand that MRE 404 is based on the premise that prior criminal behavior is not probative of the likelihood that subsequent criminal behavior will occur. And that may be true in most criminal cases. But because the way domestic violence is, it is unique in that the prior violent behavior is part of the process. The past behavior really does reflect a propensity of continued behavior. The reason we should enact this is that past behavior is unique to the crime of domestic

violence and not to the individual committing it. In other instances, in other crimes you're looking at the individual's behavior and whether he committed the crime but domestic violence, that past behavior is part of that process, it is part of the crime. And that's what distinguishes it and why--

JUSTICE YOUNG: Could you say that again. I have no idea why that is distinct. You're saying that the person who beats once, we're not interested in his personality characteristics but it's a cosmic crime that causes the repetition.

MR. MORSE: The nature of the crime of domestic violence is such that it is rarely a single event. That it is a process.

JUSTICE YOUNG: I understand the assertion. The question is, you said we're not looking at the propensity of the defendant.

MR. MORSE: No, we are looking at the propensity of the defendant in the case because that's the nature of the crime that they're involved in. That's what distinguishes it when they're committing the crime of domestic violence.

JUSTICE TAYLOR: How is that different than the case of a cat burglar where it's a person who is repetitive.

MR. MORSE: Well you may find an individual who that past behavior is indicative of what they're doing but you don't want to craft a rule of evidence to deal with that individual. But when you've got a crime that the very nature of which in the committing it is predicated on past behavior, that it is a process, then you can apply this rule of evidence to the crime and not necessarily an individual.

JUSTICE CAVANAGH: How about child abuse.

MR. MORSE: I think child abuse or perhaps--and I don't know that I would say child abuse across the board but certainly acts of a pedophile may fall into that category as well. I think our experience has shown that that is very repetitive behavior and would be in the same light.

JUSTICE CAVANAGH: Criminal sexual conduct.

MR. MORSE: I don't think necessarily criminal sexual conduct is. You often have single instances of criminal sexual conduct that may be situational. But typically experience has shown us that domestic violence is one of a process that--

JUSTICE YOUNG: What is that data? People have thrown around, at least in the materials I've seen, the assertion. But I've seen no data on this. Do you have data?

MR. MORSE: I have anecdotal data in terms of --

JUSTICE YOUNG: Yeah I know. You're here asserting that there is something unique about this crime, about its repetitiveness, that warrants that we, of all the crimes out there, we treat this separately and yet the proponents have not provided any data that shows that this is supported, other than anecdotal.

MR. MORSE: Others may be able to provide that information for you. I can tell you that in our tracking of it, over 80% of the cases we have reporting will show that there is prior instances of domestic violence involved.

JUSTICE CORRIGAN: Are you saying that on behalf of all the prosecutors in Michigan or just your county.

MR. MORSE: Mine. And in conversations with other prosecutors I can't give you a percentage but in talking with them it is a vast majority of cases involve prior acts of domestic violence. I cannot give you a percentage, however.

JUSTICE MARKMAN: Mr. Morse, option B, as you know, was based on the Federal Rules of Evidence. Do you have any data at all on how the Federal Rules of Evidence in practice have worked in this realm.

MR. MORSE: I do not. I think that one of the later speakers has a recent University of Illinois Law Review article that does some analysis of not only the federal but other states that have similar type rules as being proposed here.

JUSTICE CORRIGAN: Mr. Morse, if there is any data in the world at large about what you're saying, I think the Court would welcome seeing that information so it would help us to make a judgment.

MR. MORSE: All right, so there would still be an opportunity if I can lay my hands on something, I can submit it to the Court for your review?

JUSTICE CORRIGAN: Yes, I would invite you to do so as soon as possible. Thank you. Next speaker is Debi Cain, Michigan Domestic Violence Prevention and Treatment Board. Is Ms. Cain here?

MS. CAIN: Good morning. I am Debi Cain and I have worked in domestic violence for more than 25 years, first as the founder of Haven, which is Oakland County's Domestic Violence, Sexual Assault and Child Abuse Agency, where I served as the Director as 15 years. And currently in my capacity as the Executive Director of the Michigan Domestic Violence Prevention and Treatment Board. I'm here in that capacity today to support the adoption of alternative A of the domestic violence exception to Rule 404B. My hope today is that I can provide for you a voice for some of the many thousands of victims of domestic violence that I've worked with and spoken to over the

years. Many people believe that the solution to domestic violence is simply for the victim of the violence to leave the abuser but unfortunately leaving is not always an option that insures safety. We know from too many tragic news reports and from many of the cases that you've probably presided on, that the violence in fact may escalate and even result in homicide after the victim leaves. And so the reality is that many victims of domestic violence rely on the criminal justice system to provide them safety from their abuser. Batterers batter because they make a conscious and calculated choice to do that. Because the violence gets them what they want and because they believe they can get away with the violence. Unless the cost of this violence outweighs the benefits, the abuser will continue in most circumstances to use the violence. Victims therefore rely on the criminal justice system to hold batterers accountable for this and successful prosecution of these cases is essential for the safety of individual victims and for the deterrence and prevention of future violence. Successful prosecution is difficult, however, because victims often know that participating may in fact lead to retaliation by their abuser. Therefore some victims make a very rational choice that it is safer for them not to testify against their abuser. And even when they do participate, the prosecutor may not be successful in convincing the jury that the violence happened because they don't have all of the necessary information to understand the pattern of domestic violence and its relationship to the charged offense. This domestic violence exception provides a vital tool for overcoming these obstacles. Evidence of the abuser's acts are necessary to help the jury understand why the victim of violence is not participating or supporting in the prosecution when that's the case. Evidence of the abuser's other acts helps the jury understand the motive for the crime, the intent of the abuser and the context of the violence. Without this it is often difficult for jurors to understand what they're dealing with in a particular crime.

JUSTICE MARKMAN: If the victim testifies, you would still allow the propensity of the evidence to be introduced, is that correct? You would not introduce it only when the victim has chosen not to testify or recanted. You would allow it in any prosecution for this kind of offense, is that right?

MS. CAIN: Yes. And again I think that's because understanding the context of the violence is important, that the victim's behavior, whether they participate or not, and the level of fear, is sometimes not represented by that particular situation of violence that they've experienced. I do understand that the other acts of evidence in domestic violence cases already meet the requirements for admissibility--

JUSTICE CORRIGAN: Ms. Cain, your 3 minutes is already up. Thank you for appearing this morning. Next we have Honorable Amy Krause.

JUDGE KRAUSE: Good morning, Chief Justice Corrigan and our esteemed Court, I thank you for your time here today. My name is Amy Krause and I'm a judge at the 54-A District Court here in Lansing. I'm also chair of the Michigan Domestic Violence Prevention & Treatment Board and I am here as chair of that Board to speak to

you today. Three minutes is not very much time so I'm going to let go of a lot of the things I thought I would tell you and start with this. That in terms of support and data, I've just been handed this article "Prosecutorial use of other acts of domestic violence for propensity purposes. A brief look at its past, present and future." If I may present this to the Court.

JUSTICE CORRIGAN: Just submit it to the crier. Thank you.

JUDGE KRAUSE: Survivors of domestic violence must rely on the criminal justice system for safety. The system is the key to enhancing safety and justice through other systems. If the criminal justice system fails, the survivor and his or her children are left without meaningful options for safety, stability and justice. Now the important part here I think is that in domestic violence cases other acts evidence routinely and consistently is necessary to explain victim behavior and to help the jury discern and understand the perpetrator's motive and intent as well as the context of the crime. Really we talk about this being for propensity. In a sense with domestic violence what we're talking about is the cycle of violence. So the other acts are almost seen as a res justi part of the crime.

JUSTICE MARKMAN: Well if that's the case, wouldn't they be admissible under 404B anyway?

JUDGE KRAUSE: That's an interesting point, very good question, Justice, thank you for asking that. The problem is trial courts routinely don't let this evidence in and the evidence does meet the text for admissibility under the court rule and under People v Vandervleet, that's true. Unfortunately, the reality is that when trial courts refuse to admit this evidence it never gets heard. And as you know, even when the trial court agrees to admit this kind of evidence, such as in People v Starr, Court of Appeals panels overturn that and then we end up having to come to you again because people don't want to follow Vandervleet. As you saw in the majority opinion in the Starr case, the Court of Appeals basically ignored you and said that wasn't what we were going to do. That happens on a trial court level and when there's an acquittal there's no appeal. That's the problem here. If there's an acquittal there is no way to appeal and what we have here is rulings being made during trial that don't get appealed. And as you saw in the Starr case like I said, even if it's admitted--other acts evidence--some other panel of judges is going to decide they don't want to follow what you said.

JUSTICE CORRIGAN: Your red light is on. I can see it. Are there any questions, Justices, for Judge Krause?

JUSTICE MARKMAN: Can I ask you the same question that's been asked earlier. Please try to distinguish this crime from other crimes and tell us why this propensity evidence is more appropriately admissible here than in the context of other kinds of crime.

JUDGE KRAUSE: An excellent question again, Justice Markman. Let me say this. That it's I think what I told you earlier. That with domestic violence the whole cycle of violence, the pattern of violence, is in fact a part of the crime. It is the res justi of the crime of domestic violence and I think in this article you'll see what I'm talking about. The point is that, with a cat burglar, I think was the example that was used, it's not a cycle. It doesn't mean that that's a part of the crime that was charged. And in the case of a cat burglar, let's be honest, that 404B evidence is going to come in because it's going to be the same kind of motive and the same MO and they're going to let that in. Whereas judges are not letting in other acts of domestic violence because they don't see it the same way. And quite frankly, domestic violence and sexual assault, as we all know, are seen differently as there is a sort of a taboo around them and I think that's the difference in this type of crime of domestic violence is that you have to look at the entire cycle to be able to understand the crime that's charged.

JUSTICE CORRIGAN: Thank you Judge Krause. Next speaker is John Gear.

MR. GEAR: Good morning Madam Chief Justice, Justices. My name is John Gear. Before going to law school I served on the board of the Benton/Franklin Rape Relief Crisis Center, later named the Sexual Assault Response Center in the state of Washington. My wife taught graduate classes to social workers in family violence, classes on the identification and treatment of family violence and domestic violence. So I'm rather surprised to be here to oppose the proposed amendments because I feel that in the end it is a results oriented change that is being proposed that will damage the criminal justice system because it will damage the presumption of innocence. And I am here to simply say that domestic violence is a horrific crime that has terrible consequences but if we then change the rules to assure convictions for all accused, it is a damaging thing to the justice system and we need to step back and say is this the only way--

JUSTICE CORRIGAN: Can I ask you a question on your presumption of innocence argument. Isn't every piece of evidence in a criminal trial admitted in order to damage the presumption of innocence? Isn't that the purpose of the trial, for the prosecutor to attempt to prove guilt beyond a reasonable doubt.

MR. GEAR: Yes, ma'am.

JUSTICE CORRIGAN: So I need you to focus your argument for me. Why is this particular category, what are you trying to tell us.

MR. GEAR: That the Rules of Evidence are designed to insure that we try a conduct rather than a stereotype and when the domestic violence, the cycle of violence and the accusations about accusers are brought before a court, if this propensity evidence

is brought in, I think the people are going to try to stereotype and they're going to say we know he did it because he did it before and we heard he did it before. And--

JUSTICE YOUNG: Is that a stereotype. Don't we in our regular lives operate on exactly the opposite principle that under girths 404B, that when we see people acting consistently over a course of time that we're not surprised when they continue to do so. Whereas 404B turns that common sensical understanding on its head and says we're not going to allow people to operate on established propensities.

MR. GEAR: Of course, because the consequences at a criminal trial, particularly with violent crimes that can be third strikes are so severe that we must be more careful not to err, not less. We can't relax.

JUSTICE YOUNG: What would be error.

MR. GEAR: Error is convicting someone on propensity evidence who neither had the propensity nor did not commit the act charged. There are false accusations. My time is up. I thank you very much. Are there any questions I can answer.

JUSTICE MARKMAN: Why is the introduction of more evidence, the presentation of more evidence to the fact finder destructive of the criminal justice system. Isn't the premise of our system that juries if presented with evidence, some of which is good evidence, some of which is not good evidence, can make distinctions on the value of that evidence. Why shouldn't we leave it to the jury to make reasonable distinctions on what really is merely propensity evidence and what is relevant to the facts of the instant crime.

MR. GEAR: I would answer that by saying let's go through all of section 4 and look at the evidence of insurance, evidence of subsequent remedial measures. The Rules of Evidence are a series of policy judgments about what juries should and should not consider based on how we think juries behave. And in this case, particularly in the inflammatory case of people who are charged and on trial for domestic violence, I think there's a very grave risk of wrongful conviction--

JUSTICE MARKMAN: Even with strong cautionary instructions?

MR. GEAR: I don't believe in cautionary instructions. I don't think that any trial court believes that juries hear those instructions and there's not much evidence that they affect because you can't unring the bell.

JUSTICE MARKMAN: Doesn't that call into question the whole premise of our jury system then, that juries are not going to be paying attention to what a judge says about a case.

MR. GEAR: It's not a perfect system. That's why we have to be careful. The question is where do you want to err. Do you want to convict innocence or let the risk of some guilty go free. In the end I think we have to err on the side of not convicting the innocent.

JUSTICE CORRIGAN: Thank you counsel.

MR. GEAR: I'm not an attorney yet.

JUSTICE CORRIGAN: Oh, I thought you were. Good argument. May we have Leslie Hagen please.

MS. HAGEN: Good morning. I'm Leslie Hagen. I am here in my capacity as a former state prosecutor and current assistant United States Attorney for the Western District of Michigan. It may interest you to know that I also served on the 2001 Governor's Domestic Violence Homicide Prevention Task Force and am currently chair of the State Bar of Michigan Domestic Violence Committee. I come before you today as someone who currently uses prior offenses evidence in the same way that is being considered for use here in Michigan. As you know, Congress in 1994 amended the Federal Rules of Evidence adding special provisions dealing with the admissibility of evidence of other sexual acts in sexual assault prosecutions. Two parallel provisions were adopted. Rule 413 allows the introduction of evidence of prior sexual assault and Rule 414 allows the introduction of evidence of prior child sexual molestations. Since 1994, federal judges are allowed to hear evidence of prior sexual acts for the purpose of proving the defendant's propensity to commit sexual assault crimes. The legislative history makes clear why Congress approved the admissibility of prior sexual offense. Quoting Representative Susan Molenari during the hearings, she said "In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant, a sexual or sado-sexual interest in children that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense. Admission of this type of evidence is not automatic and protections are afforded the defendant. The government must provide notice to the defendant at least 15 days prior to trial of its intent to admit this type of evidence and even then the courts still have to engage in a 403 balancing determination. There are several factors the case law has put out that courts look at in making this 403 determination. Some of them are how clearly the prior act has been proved, how probative the evidence is of the material fact it is admitted to prove, how seriously disputed the material fact is, whether the government can avail itself of any less prejudicial evidence, the similarity of the prior acts to the charged offenses, closeness in time of the prior acts to the acts charged and frequency of the prior acts. Case law has said in the case of United States v Lamay, the court said there

'We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414.'"

JUSTICE CORRIGAN: Ms. Hagen, your time is up. Are there any questions?

JUSTICE WEAVER: Could you please tell us, finish your sentence and then could you please tell us of version A or B which one do you favor.

MS. HAGEN: Okay. The rest of the quote is "As long as the protections of Rule 403 remain in place to insure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." And in terms of the different proposals that are before the Court, the federal rules more closely follow Proposal B. And my position as an Assistant United States Attorney, I can't advocate for one position or another but I'm here today to tell you that this is something that is done with regularity in the federal courts. That the defendant's rights are protected, courts engage in a balancing act--prejudicial versus probative value--every day. But given the sensitive nature of these cases, domestic violence, sexual assault, it's very important that juries hear all of the evidence in a case so that they can make a determination about the guilt or innocence of the defendant and also the credibility of these victims.

JUSTICE WEAVER: And either A or B covers that.

MS. HAGEN: Yes. Thank you very much.

JUSTICE YOUNG: Is domestic violence a federal crime now?

MS. HAGEN: It is if it occurs on a military installation or on an Indian reservation.

JUSTICE CORRIGAN: Thank you counsel.

Items 3 & 4: 2002-06 BLE RULE 2(B)

JUSTICE CORRIGAN: The next item the Court is considering, Items 3 & 4, Proposed Amendments of Rule 2(B) of the Rules of the Board of Law Examiners, whether the LLM option should be eliminated from the rules governing admissibility to the State Bar of Michigan by examination, and whether an applicant as well as a law school would be allowed to request approval of the school's reputation and qualifications if the school ceases operations after the applicant's graduation. Is Linda Parker, the President of the Board of Law Examiners, here?

MS. PARKER: Good morning, my name is Linda Parker and I am here on behalf of the Board of Law Examiners. I am the president of the Board of Law Examiners. And we are here today to oppose Rule 2(B) as it is currently written for the following reasons, and I want to start off by saying that the rule we believe speaks directly to setting a standard of eligibility for those applicants who desire to sit for the bar exam in the state of Michigan. The first reason that we oppose the rule as currently written is because we feel it is inconsistent with the law. MCL 600.940 specifically says that every applicant for examination is required to be a graduate from a reputable and qualified law school duly incorporated under the laws of this state or another state or territory or D.C. or the United States of America. We believe that the underlying rationale for the Legislature's ruling here was to ensure that there was a basic level of competence for those who sit for the bar examination in Michigan with the recognition that those who are successful on passing the bar will in fact be delivering legal services to the citizens of Michigan. And it has been agreed and long-settled that what constitutes a reputable and qualified law school is a determination to be made by the ABA. And the ABA has through a systematic review of the school's J.D. program, the foundational legal degree program, they provide quality educational assurances as a result of their review. The ABA review which can eventually lead to a school's accreditation includes a determination as to whether or not there has been an adequate exposure of the students to basic American law and whether or not there has been adequate exposure to principles of professional responsibility. What the ABA accreditation does not do is it passes no judgment at all, in fact it provides no review at all for any LLM program and the ABA is adamant about making that distinction. They can come into a school and determine that the J.D. program is up to muster. They do not make any judgment at all as it relates to the LLM.

JUSTICE CORRIGAN: Can I interrupt you for a clarifying question. Am I correct in saying what you are here advocating is that we strike the current rule. You oppose the current rule. And the Board of Law Examiners initiated this request to the Court, correct?

MS. PARKER: Correct. We initiated the request that the rule as currently written be stricken to remove the reference to LLM and LLB as a qualifier for sitting for the Michigan exam. So the scenario that we currently have under the present rule is that you can have a law graduate who has attended, for example, the University of Cairo or let's say a school in the United States that has not been ABA accredited. And they then decide that they want to go on to pursue the LLM from a school that is in fact accredited, from Wayne State University, for example.

JUSTICE CORRIGAN: I think we understand. Are there any questions by the Justices?

JUSTICE YOUNG: I just have one. Are you not being inconsistent in asking to rely on the accreditation process and therefore striking the LLM exception to

the J.D. requirement and failing to request that your discretion under Rule 7 be stricken. Rule 7 allows the Board, as I understand it, to waive any requirement including apparently the statutory requirement be from an accredited law school.

MS. PARKER: I agree, Justice, that there is somewhat of an inconsistency here and that actually, the reason we're asking for the second half of the amendment here or the second amendment is because the Court in the Megley v Board of Law Examiners case directed the Board to exercise its discretion in waiving the qualified and reputable standard in those circumstances that it deems important. The Board took the position that it did not have the authority to waive a legislative dictate but we were directed by the Court to do so, so in order to effectuate the Court's directive, the practicality of the directive is such that if the school is no longer operating only the school can make the request of the Board. Now I will tell you that we have not allowed for any of these requests. We don't feel that we are really in a position to make a determination as to what is reputable.

JUSTICE CORRIGAN: So you might need to submit further rule language to us, Ms. Parker, on Item 7 so that we can lob that up for discussion.

JUSTICE MARKMAN: You're basically urging us to render the ABA accreditation process dispositive in this system, is that correct?

MS. PARKER: Yes.

JUSTICE MARKMAN: Are there any controversies about the ABA standards or their criteria for the accreditation of law schools? Is there anything along those lines that we ought to know. Kinds of differences of opinion about the ABA approach to accreditation, controversies in which they have refused to accredit law schools for disputed reasons.

MS. PARKER: There are.

JUSTICE MARKMAN: Where might one read about that sort of thing.

MS. PARKER: Well I know certainly in our--I'm not certain. I will have to get back to the Court and provide that information. I'm not certain if it would be in materials published by the law school, perhaps. I know in our meetings with the Board of Law Examiners the issue has come up. They have discussed it at bar admission conferences and the like. I'm not certain where that particular view--

JUSTICE MARKMAN: I'm just analogizing it, and maybe this is not correct, but I'm analogizing it to the judicial selection process where at one point the American Bar Association's role was pretty dispositive in terms of the evaluation of candidates but over the years that has become a much more controversial process and as a result of that its decisions have been given less and less disposition that process. And I'm

just wondering if there are similar controversies that we ought to know about in terms of the accreditation of law schools.

MS. PARKER: I am happy to bring that material to the attention of the Court. I can say, for example, that schools that have not received the accreditation just as an anecdotal piece of information, feel that a large part of it is based upon the resources that are actually present in the school. They look at the library and the quality of the law library, and there are schools that have not received the accreditation and feel that perhaps that is not necessarily a fair standard because you are actually dealing with the financial resources that are available to the school, just as an example.

JUSTICE TAYLOR: Aren't some of them also that argue that the ABA will not approve law schools which don't have what the ABA considers to be a suitable number of full-time faculty.

MS. PARKER: That's correct Justice.

JUSTICE TAYLOR: Too many adjuncts. I think the New England College of Law or some name similar to that--

JUSTICE CORRIGAN: Well it's a joint committee, is it not, the ABA and the American Association of Law Schools. It's not just American Bar--

MS. PARKER: It is a joint. It's not just the ABA.

JUSTICE TAYLOR: In having your group think about this, the law examiners, they might also consider whether or not it is constitutional for the state of Michigan to delegate to the American Bar Association the authority to determine who is qualified and who isn't. A case they might read on that is a case we released about a year ago, Taylor v Smith-Klein where there is some discussion of that.

MS. PARKER: Okay.

JUSTICE MARKMAN: The American Bar Association as I understand it, continues to insist upon certain minimum numbers of books in law school libraries. That may well be a very wise requirement but I guess my experience in working with my law clerks who are recent vintage law school graduates is that the use of libraries has declined enormously in recent years as computer access has grown and I guess I wonder whether or not there are some legitimate areas of dispute that occur with respect to ABA accreditation then.

MS. PARKER: And I would imagine certainly that their review and their standards for reviewing could be tweaked, could be modified in terms of just the point you're mentioning as an example, Justice Markman, but I think what the Board will have to grapple with is, if it is not the ABA standards, whose standard is it.

JUSTICE TAYLOR: That's a good question. Is there an alternative organization that accredits.

MS. PARKER: I cannot answer that question, Justice Taylor.

JUSTICE WEAVER: Could you tell me what problems have arisen with allowing on proposal #1 (inaudible) American law school graduates and lawyers sitting for the bar examination. What's the problem with that that the ABA doesn't like.

MS. PARKER: Let me point out too, this does not only have an impact on applicants who have received their J.D. from a foreign law school, it can apply to applicants who have received their J.D. from a non-accredited American ABA school. First of all let me say this. That the numbers of applicants who are electing to qualify by virtue of having an LLM degree, it has grown slightly. This year for the upcoming exam we have 14 applicants who fall into that category. Now that number is not particularly large, but we are concerned about the potential growth for that number. As an example, we are aware that there are two law schools currently that offer the LLM via the internet. And so we feel that with the advance in technology the numbers can grow. And I don't think the Board of Law Examiners in terms of its current admission, we will not have information that will tell us and correlate and say these LLM students have in fact been the subject of a disproportionate number of grievances from the Attorney Grievance Commission. We don't have that kind of information But I think we are satisfied with the risk created by allowing these students to sit for the bar with absolutely no agreed-upon standard, and that standard is the ABA standard. There's a risk that we feel we have a duty to protect against. And we think that the ABA accreditation mitigates that risk. So we don't have horror stories right now but we see the typical example, again, is the applicant who has received their J.D. from a foreign university, comes and gets the LLM in a very specialized--remember the LLM program is very, very specialized in internationalism or taxation, sits for the Michigan exam and then begins to do divorce law or handles incorporating corporations.

JUSTICE MARKMAN: You've missed one component there. They sit for the exam and they pass the exam.

MS. PARKER: Right, and I want to address that position as well. That that is the argument on the other side. If the applicant is able to pass the exam, what's the problem. But we have to go back to the legislative intent. There was a concept there that we needed to screen for who was eligible. And I guess we would certainly admit that if in fact anyone can come in and take an exam and not have to be qualified so to speak, or subject to some standard to take the exam, then why do we have law schools. Why do we have an ABA accreditation process.

JUSTICE TAYLOR: There are jurisdictions, ma'am, that do not require law school graduation. Vermont, for example, Iowa. And there may be others.

MS. PARKER: And Michigan, thankfully, I would say, is not one of those states.

JUSTICE TAYLOR: In talking to Vermont lawyers it's interesting. They seem to feel that there are many people who are trained in law offices that do quite well.

JUSTICE YOUNG: Do their Justices have to go to law school?

JUSTICE TAYLOR: I don't think so. In fact I think there is somebody on the Vermont Supreme Court that did not go to law school if I'm not mistaken.

JUSTICE WEAVER: We've had Justices who haven't.

JUSTICE CORRIGAN: Ms. Parker, let me thank you and your colleagues for the enormous amount of work that you do on a voluntary basis in terms of your administration of the bar exam and we are grateful to you for that additional service to our profession. And I would also ask that you follow up with the Court and deal with the questions that we have asked this morning.

JUSTICE MARKMAN: Chief, can I ask just one other quick question. Just to follow up on Justice Weaver's question concerning the extent of the problem, do you have any estimates in terms of how many lawyers of the estimated 35,000 in Michigan would not be practicing today if we had the rule that you suggest in place.

MS. PARKER: No, but that I believe we can ascertain. We would just look at the number of students who have come in and sat based upon the LLM.

JUSTICE MARKMAN: Just to get a sense of the extent of the problem that would be helpful.

JUSTICE CORRIGAN: It wouldn't be just the LLM, it would be the unaccredited's too, right?

MS. PARKER: Yes.

JUSTICE CORRIGAN: So you would need--

MS. PARKER: Well, no. It would be those who have qualified using the LLM and their circumstances such that they did not get their foundational degree from an accredited school.

JUSTICE WEAVER: And you have 14 now. Twice a year you might have 30.

JUSTICE CORRIGAN: That's the LLM category. What about the individuals for example from the unaccredited schools who would be applying.

MS. PARKER: They cannot sit for the exam if they have not come from an accredited law school.

JUSTICE CORRIGAN: All right.

JUSTICE WEAVER: So we have no horror stories on that but we do have horror stories from the ones that go to law school.

MS. PARKER: Absolutely.

JUSTICE CORRIGAN: All right. Thank you for coming.

ITEM 7: 2003-15 AO 1993-5

JUSTICE CORRIGAN: The next item for which a speaker has signed up is Item #7 on our agenda. This is a proposed amendment and redesignation of Administrative Order 1993-5. Should the administrative order be amended to permit more timely and effective responses to public policy proposals. First speaker is Barbara Goldman.

MS. GOLDMAN: Good morning, Your Honors. I'm here on behalf of both the Animal Law section of the State Bar of Michigan and the Appellate Practice section. And I think the fact that I can say Appellate Practice section and Animal Law section and you know what that means makes one of the points I want to make. Since we only have 3 minutes I'll try and keep this brief. We don't have a problem with the information that you've asked to have included with one small exception which is that we really don't think, as least based on the legislators that I know, I don't think they really need a head count of the number of members of a section. I think they would be happy with an approximation.

JUSTICE YOUNG: How many do you have.

MS. GOLDMAN: Well the Animal Law section has 165 members, actually it has 168 members. It had 167 members--

JUSTICE YOUNG: Why isn't that relevant information?

MS. GOLDMAN: That's relevant but an approximation is sufficient. If I say 165 does that make a difference to you instead of 167. The Appellate Practice section has I think 686 members. We would be happy to say we have approximately 680 members. Do we have to call the State Bar every time we make a public comment and get a head count as of the late date of business. That's the only thing we have a problem with.

JUSTICE YOUNG: So you want to be able to approximate rather than say on the nose.

MS. GOLDMAN: Right. The other thing is that the information you requested, we would be happy to supply it but in a format that is a little less cumbersome than I, for example, developed this, you can't really see this because I didn't have the time to blow it up, but this is what you've asked for. I can make a nice text box that has that information. I can include it in a written comment. I can put it in a footnote, I can put it at the end, I can put it somewhere, but to have to include it as a permanent flag above the beginning of the text, that is the only thing we are requesting, that you--

JUSTICE CORRIGAN: Can I ask that you submit that document in some format so we can take a look at it. It doesn't have to be that one, just later on--

MS. GOLDMAN: I would be happy to. And the other two points, the Appellate Practice section is particularly concerned. We do a lot of our comments on court rules. The audience is Your Honors, it is the rules committee of the Court of Appeals or it's the Court of Appeals judges. It's a specialized audience. They understand who is making the comment.

JUSTICE YOUNG: On the contrary. It has take me a great deal of time to figure out that the sections do not represent the State Bar and the section spokesmen have made no effort to make that distinction. In fact it is the State Bar that has been a proponent, both in its internal rules and in suggesting changes here, because sections have been profligate in suggesting otherwise.

MS. GOLDMAN: My three minutes are up. Can I respond? Again we don't have a problem with providing this information. We're simply asking that we be permitted the flexibility of providing it say at the end rather than at the beginning.

JUSTICE YOUNG: How about on a title page?

MS. GOLDMAN: Well that leads me to my second point which is amicus briefs. The State Bar which is responding to the concerns that Your Honors have expressed promulgated a change in Article 8 of the Bylaws and now requires that sections who are making comments include some additional information. But their rules specifically excepts amicus briefs because you know what an amicus brief looks like. You know what a brief looks like. Do you want to require that we include on the front page of an amicus brief a text box similarly to what I showed you. That information can be provided, it can be provided permanently. We're asking for the flexibility of not being required to put it on the front page.

JUSTICE YOUNG: Is that ideological advocacy as defined in the order.

MS. GOLDMAN: The proposed order from this Court does not except amicus briefs whereas Article 8 of the State Bar Bylaws does.

JUSTICE YOUNG: My question is, is advocacy in an amicus brief a prohibited activity, as defined as ideological activity.

MS. GOLDMAN: Well our understanding of ideological activity as has been defined by the State Bar in the past has included amicus briefs.

JUSTICE YOUNG: No, the State Bar doesn't set the rules, the Court does. Does our order define ideological activity.

MS. GOLDMAN: My recollection is your order does not define ideological activity, which is one of the problems.

JUSTICE YOUNG: Well maybe I should suggest that you look at Section 2(F).

MS. GOLDMAN: Well then you've addressed problems if that's the case. If amicus briefs are not considered ideological activity then we don't have a problem with that.

JUSTICE YOUNG: I was asking you but obviously you haven't--

JUSTICE CORRIGAN: Thank you Ms. Goldman. Next speaker I have listed is Janet Welch. Is Ms. Welch here this morning?

MS. WELCH: Good morning, I'm Janet Welch, general counsel for the State Bar of Michigan. I let Clerk Davis know that I would be in attendance if you had any questions. I don't have anything to add.

JUSTICE YOUNG: Can I ask you that question then. Are amicus briefs ideological activity as defined in the order. Not by the State Bar but in our order.

MS. WELCH: By your order? I think that ideological activity is not defined but to the extent that you can separate out amicus briefs as not an ideological activity that would be helpful.

JUSTICE YOUNG: State Bar of Michigan shall not accept, as provided in this order, use the dues of its members to fund activities of an ideological nature that are not reasonably related to, and then there's a series of exceptions--safety zones.

JUSTICE CORRIGAN: That would be in the Bylaws, correct Justice Young?

JUSTICE YOUNG: Is that the Bylaws? That's in our order.

JUSTICE CORRIGAN: Is that in our order?

JUSTICE YOUNG: That's in our order.

MS. WELCH: Our Bylaws speak to statements of public policy. The limitations in terms of ideological--

JUSTICE YOUNG: I'm sorry. That's paragraph 1 of our order. Ideological activities generally.

JUSTICE CORRIGAN: I don't think the order defines reasonably related to. I think that's the Bylaws of the State Bar of Michigan.

JUSTICE YOUNG: Isn't that the appendix order, proposed order we're publishing? Maybe not. Okay.

JUSTICE CORRIGAN: Your Bylaws further define ideological activity I think but I don't think our order did.

MS. WELCH: Which is a consideration that really is of more relevance to the activity of the State Bar which cannot engage in ideological activity except within the narrow restrictions, whereas the sections can engage in it. And what we are attempting to develop is better communications between the sections and the bar and the sections and the external world about --

JUSTICE CORRIGAN: As I understand it correctly, the reason a section could file an amicus brief that might involve ideological activity is because membership in a section is a voluntary activity excluded from Keller, correct?

MS. WELCH: Right. So the point of any provisions about the sections' ideological activity would be to make sure there wasn't any confusion that the section was speaking for the entire bar which is not a voluntary membership.

JUSTICE CORRIGAN: Okay. I think that's clear. Any other questions for Ms. Welch anyone would have? Thank you for coming.

ITEM 10: 2003-50 ADOPTION WORK GROUP RECOMMENDATION

JUSTICE CORRIGAN: The next item we'll take up for which speakers have signed up is Item 10, the adoption work group recommendations. There are certain proposed court rule amendments regarding recommendations from the Supreme Court adoption work group. The first speaker I have listed is Patti Stanley. Is Ms. Stanley here this morning?

MS. STANLEY: Good morning Honorable Justices and Chief Justice, members of the audience, both here and those that were untelevised. I am a representative of the growing grassroots organization called the Kindred Foundation. We are an affiliation of the Unity Group in Flint and the Citizens for Parental Rights in Alagon. Our considerations that we have concerning the shortening of the time frames for the LGAs or the LGALs is because it seems to, as a foster parent we have watched it happen, my husband and myself have been foster parents for 10 years and we have watched the fact that these reports and these briefs are so hard to form and they have such a heavy caseload. And I personally have acted in pro per and I have even attempted to do this brief in a process and it seems to me that shortening the time frame is usurping the due process. The time that these people have to do it. And in most cases that we've had when we've adopted children, the children that were adopted, the parents' rights were terminated. They still were in foster care for many years after that. So it didn't matter whether the parents' rights were terminated. It mattered whether or not the social workers in the lower levels had obtained connecting adoptive parent. Being a foster parent I've seen the system work at its most basic level. We took it personally upon ourselves to become our foster child's foster parent; not the babysitter, not the guardian, but parent. My first area of concern is that the proposals being considered already place these LGAs. We have had 33 children and we can count the number of appointed counsel or lawyers who have contacted us during our foster years on one hand. It is an egregious oversight that has been going on for numerous years, however in the interest of the appointed counsel's defense, and in the best interest of the children, having these lawyers be subjected to this specific type of legal action is at this point extremely counterproductive. Many lawyers that I know personally now are considering and even will eventually stop representing the children altogether in the court system. I believe, with all respect to the Court, it is putting a bandaid on a wound that is hemorrhaging. Lawyers have accountability at least through their licensing complaints and grievances at the bar association. I have tried the directors of the agencies to get direct accountability to social workers, but usually upon doing so you are blackballed and like a whistleblower in the corporate world, you are no longer getting children, sometimes as long as 3-6 months.

JUSTICE CORRIGAN: Have you been cut off from having children for filing complaints.

MS. STALNEY: I have. I have also been told not to speak to GLs--I'm sorry, I'm nervous. I've been in placed where they've actually told me that I'm not allowed to talk to the GALs, not any other attorneys, not any judges, no one, because I took it upon myself to go to these meetings with these children as if they were my own. So no matter what age they were, unless they were an infant, I would go with them. And as time progressed because I played the part and looked like an attorney I learned more and more as I just sat there. So they never told us who their GALs were, and I would pick up the name, find out who they are and then call them on my own. And then ask them what's going on, what can I do, what can I help you on your part, or vice versa.

JUSTICE CORRIGAN: So you're initiating the contact with the lawyer.

MS. STANLEY: Exactly. I don't even have a clue who they are in the beginning. And that has saddened me more than ever because you can even ask the social workers. I'll say who was appointed his GAL after the hearing, because sometimes we're not allowed to go inside the actual hearing with like Referee Albin or whatever, in Oakland County. So there are times when I get word of okay, it's--I'll use a word like Gunstadt or someone of that nature, and I'll take that name, go hunt him down in the yellow pages and I'll call him.

JUSTICE CORRIGAN: Understood. Thank you Ms. Stanley, your time is up. Is there one last thing you'd like to tell us, ma'am.

MS. STANLEY: Basically that the time shortening to me, not only for the GALs, is not going to help this matter. But also that the biological parents being slapped for not telling who their relatives are is not right. It needs to go one step further. The work group should say did the social workers contact them.

JUSTICE CORRIGAN: But the problem that we have, just to take that point, is the Court does not regulate the social workers. That's executive branch of Michigan and that's something that most people don't understand.

MS. STANLEY: I'm working on Bill 189 to get the license (?) so I understand that.

JUSTICE CORRIGAN: Thank you for coming this morning.

MS. STANLEY: Thank you.

JUSTICE CORRIGAN: William Ladd, Legal Aid & Defender.

MR. LADD: Good morning, Chief Justice, Justices. As a note, I work at Legal Aid in Detroit and I'm an attorney who represents children in the Wayne County Juvenile Court. My remarks would be about the proposals. First of all about the Section 3.915 as to the Court's requirement of inquiry about visitation by counsel. I think the questioned visitation is obviously essential and it's proper for the Court in a proper manner to inquire as to the question of visitation. But if the courts are going to do this, then I believe the courts also have a commensurate responsibility to facilitate that visitation. And I think first of all there are a number of issues that brings up.

JUSTICE YOUNG: Counsel, excuse me. Isn't this a statutory requirement.

MR. LADD: Yes.

JUSTICE YOUNG: So why are you directing your concern here when all our rule is going is saying what the statute says.

MR. LADD: I think that's a given that has to be accepted and I'm not questioning that at all--

JUSTICE CORRIGAN: Mr. Ladd, is the issue you're raising really an issue for administration in the Wayne County Circuit Court. What are you saying that the Supreme Court can do.

MR. LADD: What the Supreme Court can do I think in these rules, Chief Justice, first of all is that to assure that visitation is accomplished I think the rule and the Court can adopt caseload requirements that for counsel for children and there are regulations set out first of all by the Department of Health & Human Services as to those requirements. There are also caseload requirements set out by the ABA Center on Children and Law. And those can be--

JUSTICE YOUNG: You're talking about caseload requirements for the LGALs?

MR. LADD: Yes. Which would be a part of helping to accomplish--

JUSTICE CORRIGAN: So what you need to do, Mr. Ladd, is write us a separate letter with regard to our authority to establish--you're saying the Michigan Supreme Court should be telling the Legal Aid & Defender Association how many cases your lawyers should be carrying. You're the boss. Why aren't you saying how many cases your lawyers should carry.

MR. LADD: I'm not the boss, I can assure you Chief Justice, but those issues I think apply in all cases involving counsel for children. Other states have this court rule adopted.

JUSTICE CORRIGAN: Could you give me an example of that?

MR. LADD: I believe it's in Arkansas--

JUSTICE CORRIGAN: What I'd like you to do, because this is new material, I would like you to write us a letter and include what courts are doing what you're describing because (inaudible).

JUSTICE YOUNG: And what it is he wants done.

MR. LADD: The other issues that I think are related to that and again is part of court rules is, as the witness before me talked about, the foster parents' efforts to contact the LGAL. Similarly, as an attorney for children one of the primary impediments

to just getting that process in place is the information about the placement of the children. That is not provided as a matter of policy and I believe if there was a court rule that requires the agency to provide that information at the initial hearing--

JUSTICE CORRIGAN: Again, I hear what you're saying and I'll ask you to follow the same route because these are interesting suggestions that you're making. They're not pertinent to precisely what's in front of us. So I'll ask you to write to us about these proposals. Thank you for coming today.

MR. LADD: Thank you Chief Justice.

JUSTICE CORRIGAN: Terry L. Fessler. [no show]

ITEM 12 2003-52 COURT FILING FEES

JUSTICE CORRIGAN: At this point we will move to Item 12 on our administrative agenda, and that is regarding the matter of court filing fees. Whether the Court should retain the September 30 amendment of Rule 2.119 of the Michigan Court Rules conforming our court rules to various statutory requirements. Mike Buckles, Michigan Creditors Bar Association.

MR. BUCKLES: Good morning. My name is Mike Lecha Buckles and I am the legislative co-chair for the Michigan Creditors Bar Association that is a recognized specialty association recognized by the State Bar of Michigan. P.A. 138 2003 created a new motion fee for $20.00 in district court. The Michigan court rule, 2.119, states that a motion fee must be paid on the filing of any request for an order in a pending action, whether the request is entitled motion, petition, application or otherwise. We understand that it is appropriate to charge a fee for motions that require notice, hearing, scheduling and appearance of all parties. However, we do not feel it is appropriate to charge motion fees for ministerial actions or orders that do not require a hearing. We do not think that's the Legislature's intent--

JUSTICE CORRIGAN: Mr. Buckles, I'm going to ask you the same thing I asked the last speaker. Is this pertinent to our retention of the amendment, or are you really charting new territory in what you are requesting us to do here.

MR. BUCKLES: I think the amendment tried to deal with this particular issue of defining a motion. There were specific things that came up with SCAO on whether garnishment releases or default judgments or other matters were supposed to be actual motions. And so I'm trying to address something that was not really covered by that amendment and I think the amendment should be retained and actually should be expanded. I sent a letter to the Supreme Court Administrator's Office. That's why I'm here today, to try to express a better definition in my opinion of how we can address what the

Legislature specifically intended to charge $20 motion fees for ones where they're notice and hearing but not to have a motion fee when there's no notice and hearing. The problem is that the district courts now demand a $20 fee for filing documents that fall under the definition of 2.119 but are ministerial or ex parte. They require no notice of hearing, minimal court involvement. Such as default judgments for sum certain in district court, garnishment releases, motions for a second summons, motions for alternate service and for amended complaints that are filed within the window of 2.118(A)(1). Often we file motions for second summonses and alternate service because the debtor is evasive or the debtor has moved. The plaintiff has already paid an increased filing fee under the statute and now has to pay more money for these ministerial motions. Although the judgment creditors first charge for these taxable costs, they are eventually applied to the judgment debtor. We respectfully would request that the Court amend the court rule so that it exempts the following from the requirement of a motion fee: amended complaints under 2.118(A)(1)--those are the ones that you can file an amended complaint anytime within 14 days. We should not have to pay a motion fee for that. That's a ministerial action just filing it. Motion fees for alternate service. We filed a filing fee, Justice. Once we file that now we have to pay another $20 or maybe $40 for a second summons and an alternate service. We don't think the Legislature intended that, it really shouldn't be the definition of a motion. Motions for default judgment for a sum certain. That's a ministerial act by the court clerk. And petitions to set aside installment payment orders and petitions for installment orders.

JUSTICE CORRIGAN: All right. Your time is up. If you care to submit any additional comments you may. We have your materials that you sent us. Thank you for coming today. Seth Goldner.

MR. GOLDNER: Good morning. My name is Seth Goldner. I'm the president of the Michigan Creditors Bar Association. Let me start by saying that of course I agree and support the statements of Mr. Buckles that you've just heard. I'd like to elaborate specifically on the issue of petitions for installment payments. MCR 3.104(B) clearly states that when a defendant files a motion for installment payments no hearings are required unless an objection is filed by the judgment creditor. Likewise, at MCR 3.104(C), when a motion to set aside an installment payment order is filed by the judgment creditor, again no hearing is required unless an objection is filed by the judgment debtor. The Michigan Creditors Bar Association does believe that the Legislature did not intend motion fees to be charged in district court where again no hearings are required or the order to be entered can be done through a ministerial act only.

JUSTICE YOUNG: Is there something in the text that caused you to believe that?

MR. GOLDNER: Oh, yes, specifically. Are you stating in regard to--

JUSTICE YOUNG: As to the statute.

MR. GOLDNER: Yes, well MCR 3.104(B) and (C) both--

JUSTICE YOUNG: No, no. I don't recall. Is the court rule verbatim of the statutory change that imposed the fees.

MR. GOLDNER: I think I follow you.

JUSTICE YOUNG: Your statement was we don't believe the Legislature intended to impose fees for motions that don't require a hearing. And I'm asking, based on the text of the statute, what leads you to believe that.

MR. GOLDNER: Well MCR 2.119 states--

JUSTICE YOUNG: MCR is the court rule.

MR. GOLDNER: I understand. With regard to P.A. 138 2003, it implicitly has to define what is a motion. And in the act it states that any request that results in the entry of an order, whether it's called a motion--

JUSTICE YOUNG: Any act which results in the entry of an order. So on the basis of that language you believe the Legislature could not have intended to have wanted to impose a fee for an action that results in an order but which doesn't require a hearing.

MR. GOLDNER: That is our contention, yes.

JUSTICE YOUNG: Any particular language you're relying on?

MR. GOLDNER: Well to the extent that the SCAO just sent out Q&A's that attempt to define when a motion fee shall and shall not be applied. Again, certain types of matters were stated to be except from the motion fee such as entry of an order for default judgment for a sum certain. With regard to these installment payments and orders to set aside installment payments, there is no question that they are entitled petitions or motions. Therefore, under a literal reading of the act it would suggest a motion fee is required. However, when you look at the exceptions to the act I believe that these particular--

JUSTICE YOUNG: That SCAO is wrong.

MR. GOLDNER: Part of the problem is the SCAO has sent out conflicting Q&As. They state, for instance, garnishment releases originally should have a motion fee. Then it states--

JUSTICE YOUNG: Do you agree that the statutory language you just read doesn't seem to admit of exceptions based on whether there is or is not a hearing if an order is requested.

MR. GOLDNER: I think it's unclear what the Legislature actually meant.

JUSTICE YOUNG: I thought you said it was clear. That the intent was not to require the fee.

MR. GOLDNER: Well it's our belief that it was not their intent to do such because in practice certain types of actions and motions do not require a fee and we believe, again under MCR 3.104(B) and (C) these are exactly those types of actions resulting in orders where a motion fee would be inappropriate. Thank you very much.

ITEM 9: 2003-47 ASBESTOS DOCKETING SYSTEM

JUSTICE CORRIGAN: We'll return at this time to Item 9, this is In re Petition for Administrative Order or Court Rule Establishing Inactive Asbestos Docketing System. The first speaker I have listed is Susan Clem. Is Ms. Clem here this morning?

MS. CLEM: Bear with me, I have laryngitis. Susan Clem. Justices of the Supreme Court, I'm Susan Clem, wife of deceased Curtis Clem. My husband, Curtis Clem died 3 years ago from lung cancer caused by asbestos poisoning. This was caused by working in the foundries and auto plants in Michigan for approximately 35 years without the proper safety regulations for asbestos. Why would the Michigan Supreme Court even consider taking steps that would change or deny Michigan asbestos victims to not have a jury trial. Big corporations do not want to take the responsibility for these victims. Michigan and Michigan Supreme Court are being used as tools by these big corporations to deny working people their constitutional rights to a jury trial when corporate misconduct has occurred. I'm here today to form the Michigan Court for myself and my husband, Curtis Clem, who died unnecessarily because of working in the plants without the safety precautions that should have occurred with asbestos. These lawsuits are completely fair to the victims and families that have suffered the results of asbestos poisoning. My life has been destroyed without Curtis because of negligence regarding asbestos. Curtis's pain and suffering was unbearable as is mine now. There are no golden years. Thank you.

JUSTICE CORRIGAN: Thank you for coming, Ms. Clem. Eula Jenson. [no show]. Jimmy Castillo, Jr.

MR. CASTILLO: Good morning Justices. My name is Jimmy Castillo, Jr. I can coincide with what this past lady was saying here because my father Jimmy Castillo

worked for General Motors for 32 years and he has since passed away in 1998 and my mother couldn't live without my father so she passed away in 2000 and I think General Motors should pay for the wrongdoing that has happened, especially like to this lady here and myself. My father probably could have lived longer had he not contracted cancer. And it really saddens me that they could even think of not compensating us for it because that's what we're entitled to.

JUSTICE CORRIGAN: You understand that isn't the proposal in front of the Court, don't you. It's to create an inactive docket until symptoms emerge. It isn't to say you can't get relief. You understand that, don't you Mr. Castillo.

MR. CASTILLO: Yes, Your Honor.

JUSTICE CORRIGAN: We share and feel sympathy for the loss of your parents.

MR. CASTILLO: I just hope you will take it all into consideration.

JUSTICE CORRIGAN: We will. Thank you for coming. Michael Serling.

MR. SERLING: Chief Justice and Justices of the Court. I filed the first mesothelioma cancer case in the state of Michigan in 1976. Since that time in the past nearly 30 years I have represented hundreds of victims of mesothelioma cancer as well as hundreds of the disease asbestosis. I filed a brief in opposition, co-authored it, on December 30 and if the Court is going to consider more briefs and memoranda before making a decision I ask the Court to look at it because the brief primarily was on the issue of separation of powers and in doing this brief I felt that this high court, perhaps more than any other high court in the nation, has been deferential to the separation of powers and to the walls that divide the three branches of government. I felt that this Court in many, many pronouncements, in case opinions and in law review articles, has repeatedly found judicial legislating as anathema to our system of jurisprudence. Asbestos litigation is complex. I think the Court could see just from the ABA proposal which was really directed to the U.S. Congress and not to the Supreme Courts--

JUSTICE CORRIGAN: But am I correct in understanding that the ABA Task Force was chaired by former Senior Circuit Judge Nathaniel Jones of the Sixth Circuit, the former counsel for the NAACP, and that membership of the task force was bipartisan, was it not, including for example, people like David Christenson, a very prominent lawyer in Michigan.

MR. SERLING: Yes. But I would point out to the Court that there were no attorneys that represent large numbers of asbestosis victims. There were asbestos attorneys that represent cancer victims and at the time there was a tremendous split within

the asbestos plaintiffs bar between those representing cancer victims and those representing asbestosis victims. I represent both.

JUSTICE CORRIGAN: And, you know, there's been a mountain of material filed here, am I also correctly understanding that New York City, Chicago and Cleveland all have asbestos inactive dockets in their cities.

MR. SERLING: Where there have been inactive dockets that have come into being, they have been voluntary and usually part of massive settlement discussions between the plaintiffs and defendants. And usually in places where there were 20,000 or more than 10,000 cases or 40,000 cases. Michigan has perhaps 2,000 to 2,200. No appellate court--

JUSTICE CORRIGAN: I've looked at the materials from Judge Colombo. What's your opinion of his proposal to create a statewide docket.

MR. SERLING: Inactive docket. I think it is improper. I don't believe there is a crisis and other colleagues of mine will speak to the issue of crisis. I just had a docket where every case on the docket was filed in approximately 2 years. One living cancer case was advanced for trial. There is no problem with cases being resolved. And I wanted to point out that there is extensive criticism of the ABA medical standard from 3 of our great universities--Michigan State, Michigan and Wayne, and I hope I'm not offending anybody by the order in which I state them but professors from the medical schools have roundly criticized the ABA standard.

JUSTICE CORRIGAN: We have read those letters and are considering them very closely. They are in the file.

MR. SERLING: It seems to indicate that the legislative body which has the tools of fact finding and which has the tools of taking testimony which is being done in Washington even regarding the ABA standard. 25 witnesses have been called in front of the U.S. Congress and the U.S. Congress is reconvening this issue in March. This is a legislative issue. The U.S. Supreme Court deferred to the U.S. Congress. Even the ABA proposal on the medicine sent it to the U.S. Congress.

JUSTICE CORRIGAN: Okay. Thank you Mr. Serling. Are there any other questions? Justice Markman.

JUSTICE MARKMAN: Mr. Serling, so as I understand it, it is your view that the inactive dockets that exist in other states also are violative of the separation of powers doctrine as you understand it, is that correct.

MR. SERLING: Well they've never been ruled on by appellate courts and in my opinion they were part of negotiation where tens of thousands of cases were resolved by the plaintiffs and the defense bar. We also have cooperative relationship with

the defense bar over the past 30 years. In the early years cases were tried all the time. Very few cases have been tried now because there has been an understanding of the strengths and weaknesses of cases and the defense and the plaintiffs bar know each other very well and are experienced and have expertise.

JUSTICE MARKMAN: And it's violative as I understand, in your judgment, of separation of powers not because we would be countermanding anything that the Legislature has actually done, but that if there is to be a solution here it's your judgment apparently that it should come from the Legislature.

MR. SERLING: Yes. I think when you're redefining the definition of a disease, it's the province of the Legislature and not the Supreme Court.

JUSTICE CORRIGAN: But if it's strictly judicial housekeeping or docket management without intruding into redefining damages, then that is our purview, is it not.

MR. SERLING: Well if you weren't taking away substantive rights of victims you may be correct, but I think you are and--

JUSTICE YOUNG: Can you tell me what the populations we're dealing with--the parties have not had a consistent description of what we're dealing with in terms of population intended for--

MR. SERLING: In terms of numbers?

JUSTICE YOUNG: No. I'm just talking their characteristics. Are we dealing with a group of people who have at least a theoretical exposure but no manifest damages.

MR. SERLING: I do not believe that.

JUSTICE YOUNG: I want to hear what your characterization of the pool of people--there's clearly a category of people manifesting cancer. And then there's a continuum I presume, of people who aren't quite at the cancer stage but all the way to people who have no symptoms at all. Is that correct?

MR. SERLING: Not exactly because the disease asbestosis is not cancer but it's a scarring of the lung and it's very debilitating. And the ABA standard--

JUSTICE YOUNG: Are we talking about people that have frank symptoms, however they are defined by the medical profession of asbestosis that are being intended to be placed on the (inaudible) docket.

MR. SERLING: Inactive docket? Yes. Symptoms of shortness of breath, symptoms of difficulty breathing, susceptibility to respiratory illness and pneumonia, and many, many of those people would be excluded under the ABA standard.

JUSTICE MARKMAN: Mr. Serling, am I thinking about this correctly. Am I compartmentalizing this properly in my own mind by thinking about four categories: those who have cancer, those who have asbestosis, those who have had exposure with some symptoms thereof and those who have had exposure without symptoms.

MR. SERLING: There is no category of exposure without disease because we must give a diagnosis date of the disease asbestosis when we file the complaint. So any case with exposure without disease is really not actionable in the state of Michigan under current law. So there really, I would say, are three categories. Asbestosis, non-cancerous scarring of the lung; there is mesothelioma, the signal tumor, and there is also lung cancer.

JUSTICE MARKMAN: So mere exposure is not sufficient to put one in a category.

MR. SERLING: Mere exposure is not sufficient. There has to be a diagnosis and Dr. Kazerooni from the University of Michigan is here to discuss the x-ray findings and how one determines when asbestosis is exhibited.

JUSTICE CORRIGAN: I think we understand that. I think the ABA line is what, functionally impaired, in their proposal.

MR. SERLING: Well the ABA is based on breathing tests where they require strict dysfunction that would exclude maybe 75 or 85% of people that really have disease that currently are defined as disease that are suffering from symptoms and that have x-ray evidence of disease.

JUSTICE CORRIGAN: Why would plaintiffs in other states voluntarily agree not to have those cases be advanced?

MR. SERLING: I believe it's because where there were 10,000 or 20,000 cases or 40,000 like in Ohio, they resolved a massive group of cases and worked with the court in voluntarily coming up with a standard where they wouldn't file cases or they would put them on an inactive docket, but never an appellate court.

JUSTICE MARKMAN: Tell me again, why would plaintiffs not want their cases abeyed and presumably protected by such abeyance until damages have fully manifested themselves. Why is that not in the interest of plaintiffs.

MR. SERLING: I'm not sure if I understand the question.

JUSTICE MARKMAN: Why is it not in the interest to create an inactive docket where the concerns of plaintiffs are abeyed and protected presumably until such time as the manifestation is fully realized and damages are fully determinable.

MR. SERLING: I think it's because of the disagreement over the medical standard at which you would reach that point. For example, I tried opposite Mr. Krause the first asbestosis case in Michigan and at the time the same doctor that is here today claimed that the victim did not have asbestosis. And it went to the jury and there was argument back and forth and the jury found for the plaintiff. It was basically on the medical. And from a historical perspective, that was 1981, by the mid 1980s this man died a horrible death where he suffocated and died and yet he might be a candidate to be put on the inactive docket today. It just would not be fair and it would be a denial of substantive rights.

JUSTICE CORRIGAN: Okay. We understand your position. Thanks Mr. Serling. Margaret Holman Jensen.

MS. JENSEN: Good morning Chief Justice Corrigan and Honorable members of the Michigan Supreme Court. I am here today to ask that the Court deny the petition that is in question. Although the petitioners have tried to present this as a procedural issue, I truly believe that what they're asking for is a substantive change in the law. They are not asking to delay trial but to deny an existing remedy. It is not a matter of docketing, it is a matter of changing a common law cause of action .AS the law stands today a plaintiff who has injury and disease, injury to his lungs as a result of exposure to asbestos, can sue the companies who manufactured and sold these products with knowledge of the dangers but which failed to warn. Each of our clients has disease, an actual injury, a scarring of the lungs which is permanent and irreversible. Our clients complain of shortness of breath and fatigue which are symptoms of the disease asbestosis. We present evidence by board certified pulmonologists of our clients' disease asbestosis. We do not bring suit for people who merely have exposure to asbestos but who do not have disease. And if we do, there's a remedy called summary disposition. What the defendants seek to accomplish is to create a threshold injury standard similar in concept to the threshold standard that was created by the Legislature in the no-fault act. They are seeking to impose a standard of serious impairment of breathing function before a plaintiff can proceed with an asbestos lawsuit. This would eliminate the right to jury trial for countless Michigan residents, even though they are truly sick and have symptoms of their disease. We believe that if there is going to be a substantive change in the law where a premium is placed on one party's interest over another, that the Legislature should consider those policy considerations. If there is an inactive docket created in Michigan it will not solve the problems of these companies that are really sued on a national basis but it will harm the people of the state of Michigan who may never receive fair compensation for their injuries even though plaintiffs in other states with similar injuries continue to collect compensation for their injuries. Furthermore, Michigan has

already provided various protections for defendants in our state. We have caps on non-economic damages; we have the abolition of joint and several liability so that a defendant is only liable for their own negligence and their own share of contribution to the injury. We have non parties at fault which the defendant can point to even a bankrupt company to say they caused 50% of the plaintiff's injury.

JUSTICE CORRIGAN: Your time is up, counsel. Any questions for Ms. Jenson. Thank you for coming this morning. James Bedortha.

MR. BEDORTHA: Good morning, Madam Justice, associate Justices. Thank you for allowing me to speak. My name is James Bedortha. I have represented individuals with asbestos lung disease here in Michigan for about 12 years. I want to address first off the issue of whether there is some crisis in the state of Michigan that would require the unprecedented relief that Mr. Krause has sought here. I can tell you there's not a crisis when we compare it to other states Michigan has a fraction of the number of cases that other counties in other states have. There are about 2200 cases in the whole state of Michigan right now.

JUSTICE YOUNG: Most of them in Wayne.

MR. BEDORTHA: Most of them in Wayne County in front of Judge Colombo.

JUSTICE YOUNG: Do we have a crisis in Wayne?

MR. BEDORTHA: Judge Colombo doesn't seem to think so and I would bet that he's the best person to tell you. A majority of the defendants don't seem to think so or they would have signed on to Mr. Krause's petition.

JUSTICE CORRIGAN: So is this a Wayne County problem that we're dealing with or is it a statewide docket management problem in terms of--I got the sense from reading Judge Colombo's letter that there's a problem in scheduling trials in other parts of the state that sometimes conflict with Wayne County. Is that what's going on? What's going on?

MR. BEDORTHA: Madam Chief Justice, I have spent hours with Judge Colombo with members of the defense asbestos bar and the plaintiffs' bar at the Wayne County Steering Committee coming up with the case management orders that have been jointly agreed to and proposed by both sides. The latest discussions have revolved around the difficulty the defendants have with defending cases when there are different discovery schedules and trial dates all over the state.

JUSTICE CORRIGAN: So do you think we should have a statewide docket as we have done in the Microsoft litigation or the breast implant litigation. Should we do a statewide docket in this area.

MR. BEDORTHA: If the statewide docket along the same lines as the breast implant litigation which as I understand it, and Judge Colombo played a role in that, handled pretrial procedures and then would deal the cases out to their home counties for trial, I think that's fine. Judge Colombo has handled more asbestos cases than any other judge in the state with the exception of Judge Borello I think up in Saginaw. So I think that's fine. In fact the steering committee in Wayne County intends to discuss having Judge Colombo issue some sort of order that we all agree to that would modify or at least give some structure in the way that these cases come up for trial. Judge Colombo's comments as you've read them speaks to the fact that the defendants feel like they can't defend all these cases at once. They can't predict when a trial date in Bay County is going to conflict with a trial date down in Wayne County. I think that's a fine idea, ma'am, and having been in front of Judge Colombo two weeks ago to handle a docket of Mr. Serling's asbestos cases we were all talking about that. Members of the steering committee, defendants on the steering committee, have discussed that. I think that's where we're going anyway.

JUSTICE CORRIGAN: In the materials that have been submitted to the Court, do we have the names of the persons who are serving on Judge Colombo's steering committee.

MR. BEDORTHA: Yes, ma'am, it's Exhibit 3 or 4 to Mr. Krause's most recent submission that I objected to the untimeliness. The Case Management Order No. 14 that has the steering committee members right there. It is also No. 14 which I think stands for the proposition we meet a couple 3 times a year. We discuss these things. We have tried to come up with procedures that are agreeable to everybody and the court that speak to the very issues that Mr. Krause is complaining about on behalf of, and I can't underscore this enough, on behalf of a thin minority of the defendants. Most of the defendants I believe think it's working all right or they would have signed on to this petition.

JUSTICE CORRIGAN: Anything further you want to tell us?

MR. BEDORTHA: The last thing I wanted to tell you without being repetitive at all was please make no mistake. This is not about docket management. This is about taking individuals with a common law cause of action based on their non-cancerous asbestos lung disease and saying you don't have a cause of action unless your breathing tests reach this level. The physicians that have written in have told you that the ABA proposal is going to exclude folks. That's wrong. If this policy determination is going to be made it should be made in the Legislature.

JUSTICE YOUNG: Why do you say it's a denial of the cause of action.

MR. BEDORTHA: Well these folks right now, Mr. Justice, have the right to bring their case.

JUSTICE YOUNG: It doesn't preclude them from bringing their case.

MR. BEDORTHA: Well they can file their case. They can't bring it in front of a jury.

JUSTICE YOUNG: It delays their trial.

MR. BEDORTHA: Not just delays it as other tolling provisions that have been adopted or at least affirmed by this Court where it's delayed for 60 or 90 or 120 days. It delays it perhaps indefinitely. There will be people whose breathing tests will never get so bad that they meet that ABA standard who still can't walk up a flight of steps because of their asbestosis. Those folks have had a right for 25 years in this state to seek a remedy. Mr. Krause is asking you, the Supreme Court, to take it away.

JUSTICE MARKMAN: And Mr. Serling as I understand it identified 3 categories: symptoms, asbestosis and cancer. Now if a suit is filed when one's situation falls within one of those categories one is limited to a suit for damages commensurate with that problem, is that correct?

MR. BEDORTHA: Yes. An individual with non-cancerous asbestos disease has the right to seek damage for the fear of cancer, not the risk of cancer because it's a two-disease state. If he gets cancer later he may be able to bring another lawsuit. So he can't go for the enhanced risk of cancer that he has because of his asbestosis. He can seek recovery for the fear of cancer but the recovery is premised on the shortness of breath, inability to do that which he or she used to do--

JUSTICE MARKMAN: Explain that to me, the fear of cancer. If you smoke cigarettes you may have a fear of lung disease but you can't bring a suit on that basis, right?

MR. BEDORTHA: Correct. But if you were exposed to asbestos and you developed a non-cancerous asbestos condition, even Dr. Kvale who is here to speak to you on behalf of Mr. Krause, will tell you, you have a markedly increased risk of lung cancer, especially if you are a cigarette smoker, you have a risk of mesothelioma which is an always fatal cancer only associated--by virtue of having asbestosis, the non-cancerous disease that is actionable, you have a marker that you are at an increased risk for cancer.

JUSTICE MARKMAN: But the claim that you bring at that juncture is a claim for damages related to asbestosis, not to cancer.

MR. BEDORTHA: Yes sir. Absolutely. An element of the damages might be the fear of cancer. In the cases I have tried in the past I have not pursued that element. I have focused on the here and now, the damages the plaintiff has talked about, their shortness of breath, their inability to enjoy life and such.

JUSTICE YOUNG: So you can bring a cause of action both for the asbestosis and then for the cancerous condition later. You can have two lawsuits.

MR. BEDORTHA: Larsen tells us that it's, what we in the asbestos world call a two-disease state. Meaning if you have--

JUSTICE YOUNG: You mean Michigan is a two-disease state.

MR. BEDORTHA: Michigan is a two-disease state.

JUSTICE YOUNG: Is that a majority position?

MR. BEDORTHA: I think at this point it is a majority position. Ten years ago it was not. Michigan I think was one of the earlier states to feel that it would be unjust to deny somebody who has a cause of action for non-cancerous disease to later file suit if they had yet a second disease related to the same asbestos exposure.

JUSTICE YOUNG: And that is the medical view of this, that these are unrelated diseases.

MR. BEDORTHA: What, the secondary cancers?

JUSTICE YOUNG: Yeah.

MR. BEDORTHA: With respect to lung cancer the defendant medical community would say that under certain circumstances a lung cancer can be caused or substantially contributed to by asbestos exposure. Mesothelioma has yet only one known cause and that is asbestos exposure. Those cases there is usually no real meaningful question as to what caused it. It is only caused by asbestos exposure.

JUSTICE MARKMAN: Is it your understanding that if we adopted an inactive docket and at some point cancer manifests itself in a person, that that person at that juncture would be deprived of his ability to sue for the asbestosis, or would he be able to collect all his claims at that juncture.

MR. BEDORTHA: He would be able to collect all of his claims at that juncture. What we're concerned about is the guy who has got impairing asbestosis, he can't mow his lawn. He has a disease, it wasn't his fault, and he's lucky enough to not go on to develop cancer. He still has a cause of action. It's inconvenient to the defendants.

JUSTICE MARKMAN: It's a lesser cause of action presumably.

MR. BEDORTHA: The damages historically have been much lower because the damages are I'm short of breath, I have lung infections, I can't get life insurance, as exposed to, as we heard from Mrs. Clem, a fatal disease like lung cancer, or

an always fatal disease like mesothelioma. So the damages of course are different. Thank you.

JUSTICE CORRIGAN: Thank you counsel. We'll hear from Ella Kazerooni, M.D.

DR. KAZEROONI: Good morning Madam Justice and Justices. My name is Ella Kazerooni. I am a professor of radiology at the University of Michigan Medical School, the division's chief of thoracic radiology and a board certified radiologist. I am also a certified B reader (?) and my areas of expertise in comment this morning are with respect to the imaging or chest x-rays and other imaging tests used to diagnose asbestosis. The current B reading standards set a range or a scale on which you rate the abnormalities that are present on radiographs. We know that there are many patients who have asbestosis or other interstitial lung disease who may have a mildly abnormal chest radiograph or have a totally normal chest radiograph. The wording in the ABA standard would therefore exclude many people who are diagnosed medically with asbestosis by using other tests including pulmonary function tests and the clinically accepted and widely used specialty CT scan known as high resolution CT scan from seeking any course of action based on having a medical diagnosis if these standards were to be accepted.

JUSTICE CORRIGAN: Thank you doctor. Any questions? Thanks for coming this morning. Dr. Paul Kvale, Henry Ford Hospital. I might have butchered the pronunciation of your name. I apologize.

DR. KVALE: That's all right. It's a hard name to pronounce. I call it Kvale. My name is Paul Kvale. I am a pulmonary physician, board certified as such. I work at Henry Ford Health System, have for the past 39 years. I'm the president elect of the American College of Chest Physicians. I am here speaking as an individual experienced physician, not on behalf of either of those organizations with whom I am affiliated. I see many patients with asbestos-induced lung injuries. I help take care of them, I help to diagnose their problem. I also review cases on behalf of the defense bar when there is a question about the presence or absence of asbestos related diseases. I was a witness before the American Bar Association organization that Mr. Dennis Archer asked to convene, testified before Judge Nathaniel Jones and the other members of that commission in helping them develop the kinds of things that they put forward. I would like to speak to two specific issues before you today. The first is the issue of plural plaque which are the most common abnormality that typically can be ascribed to a person's asbestos exposure. A plural plaque is simply a scar on the inside of the chest. It does not produce any symptoms in the person who has it. It serves as a marker of prior asbestos exposure and if by itself will not and does not cause any symptoms that you can ascribe to the presence of that.

JUSTICE CORRIGAN: If you have say calcification on an artery of your heart, you might not have heart disease. Would that be analogous?

DR. KVALE: That's not exactly the same analogy. It is true that the calcification in your coronary arteries likely indicates that you have a problem, it doesn't prove that you do have a problem with your heart or that you're likely to have a heart attack, but it certainly is a stronger indicator of that. I'm talking about a plural plaque which may or may not contain calcium and which though caused for the most part by asbestos exposure, does not produce symptoms. The second thing that I want to draw to your attention is that the ABA document that was proposed is that functional assessment of a person's lungs, how well he can breathe, is truly an indicator, a far better indicator of what's going on when the issue is asbestosis, yes or not, a scarring of the lung tissue which clearly can produce disability but often does not. And there is often an argument between experienced physicians about the presence or absence of scarring in the lung tissue. The pulmonary function test, the breathing tests that are done are a very helpful indicator to determine whether or not this person has impairment of his ability to do the activities of usual daily life or a work that he is required to do.

JUSTICE CORRIGAN: Just help me as a lay person understand what you just said. If you have plural plaque on your lungs, do you have asbestosis?

DR. KVALE: You do not. That by itself does not indicate the presence or absence of asbestosis. Other criteria must be applied and you look not just at the plural plaque but rather at the lung tissue. Like Dr. Kazerooni, I am also a certified B reader and the presence or absence of scarring in the lungs may or may not be accompanied by functional impairment of the lungs and the pulmonary function tests or breathing tests are a very good surrogate marker of whether or not that person has true dysfunction.

JUSTICE CORRIGAN: Thank you for coming this morning doctor. Neil MacCallum.

MR. MACCALLUM: Good morning. My name is Neil MacCallum. My firm represents a number of the defendants in asbestos-related cases and I have been practicing and defending the cases since 1988. The question was about some of the numbers that we have in the cases in this state and currently in this state since 2001 nearly 3,200 cases have been filed. 84% non-malignancies. During these same years 140 trial dates have come and gone. These have been set in 20 different counties. 2,600 cases were resolved but again 88% are non-malignancy cases. Currently there are 2,250 cases approximately pending in the state in 12 counties and we have 31 trial dates this year. 1,000 cases up for trial this year. 84% non-malignancies. During 2004 alone we will have 1,100 plaintiffs deposed. Over 85% are non-malignancies. With 250 work days in a year you can see that we are multi-tracking depositions every workday of the year to handle these cases.

JUSTICE CORRIGAN: Do you oppose the creation of a statewide docket ala the breast implant cases and Microsoft litigation.

MR. MACCALLUM: No I do not.

JUSTICE YOUNG: Wouldn't that address many of the scheduling problems.

MR. MACCALLUM: It would address some of the scheduling problems. It doesn't address all of the problems that we have.

JUSTICE YOUNG: Which wouldn't it?

MR. MACCALLUM: The fact that we have now all of these cases with so many non-malignancies coming before the courts, whether it be coordinated through Wayne County or in this fractured system--

JUSTICE CORRIGAN: Why isn't Mr. Serling's point well taken. You're trying to rewrite the elements of a cause of action in these cases by segregating cancer damages from other damages. And how do we have the authority to do that?

MR. MACCALLUM: To rewrite the law by--

JUSTICE CORRIGAN: Yes. Once damages are displayed why does this Court have the authority to intrude.

MR. MACCALLUM: Well the question is whether or not these folks are actually damaged. As Mr. Bedortha has pointed out, these non-malignancies do span between the individual who is very ill and that individual who is--

JUSTICE YOUNG: That usually is a subject matter of proofs.

MR. MACCALLUM: It is.

JUSTICE YOUNG: And what I understand the defense bar to be suggesting is the docket crowding and the way these cases are being managed and the large number makes it impossible for us to approach these in any organized way so that we can berm out those that are really not compensable.

MR. MACCALLUM: That's part of it, that is, because of the way it is. Because you have these non-malignancies and malignancies together scattered throughout the state. And when it comes time for a settlement conference you don't speak about an individual case. You speak about groups of cases. 60, 100, 120 cases at one time. And you are going to discuss with the plaintiff's attorney how to resolve these cases. And when you're doing that you're taking the very sick individuals, the very ill

individuals, the cancer individuals and the plural change case only individuals to do this together. And there is no way that you can identify any particular case and handle it individually. And our position is what you need to do is to take the individuals who are not ill, not deprive them of a cause of action, but to set them aside until they actually do have a cause of action and let's address those people who do have a cause of action.

JUSTICE YOUNG: They do have a cause of action. If there's a factual dispute about somebody who simply has plural plaque has suffered a damage or not, then what we're talking about is not whether they have a cause of action but whether they can prove that cause of action, right?

MR. MACCALLUM: Yes.

JUSTICE YOUNG: So I'm having difficulty understanding. We're not talking about people who don't have a cause of action, as at least I understand what a cause of action is. There's an allegation of damage.

MR. MACCALLUM: There's an allegation of damage. They have a doctor who has rendered an option that they have a cause of action.

JUSTICE YOUNG: And then the issue is is that true. So how do we put those on the shelf.

MR. MACCALLUM: Well we're asking that we have and adopt a standard as to exactly what it is that can cause the case to go forward at this time at the expense of those who are truly ill.

JUSTICE YOUNG: I don't understand the comment. Those who are truly ill. If I am contending I am injured and have suffered a damage, the suffer that I haven't suffered the ultimate damage is not perhaps dispositive of whether I want to have my day in court, is it.

MR. MACCALLUM: Is the question whether or not you have more than mere evidence of exposure.

JUSTICE YOUNG: Again, if the threshold question we're dealing with is do we have cases in our system for which there is no damage--there's exposure but not damage, those are subject to summary disposition, are they not?

MR. MACCALLUM: In reality no because it will always be a question of fact that will go to the jury.

JUSTICE CORRIGAN: Okay. I think we understand your point Mr. MacCallum. Thank you for coming this morning. Darrel Grams. We still have several more witnesses so I ask that you make a new point.

MR. GRAMS: Well I hope to make a new point. I'm Darrell Grams. I'm a partner with the Duane Morris law firm. I'm national counsel for Ford Motor Company. It's a pleasure to appear before you today. Bob Krause asked me to make some comments about my personal experience with Ford Motor Company. I was on the general counsel staff until going into private practice in October. The point I would like to summarize real quickly is that this is a national problem. It should be viewed as such. The action that the Court may take will have a national impact as well. I'd like to point out that a 10-K that was filed by Ford on February 28, 2003 indicated that the company had 25,000 cases. That is an increase of almost 7,000 in one year and it is because in large part of the unimpaired docket problem. So that is the point I don't think any other people are going to be making today, Your Honor. This is a problem, it is a serious problem, and the Court has I think an historic opportunity to do something for the state of Michigan as well as nationally.

JUSTICE TAYLOR: Why wouldn't this be something that would be more appropriately addressed to the Legislature inasmuch as what you're talking about is altering when you can bring a lawsuit. I think historically we've said if you've had any damages you can then go forward. You're asking for "any" to be replaced with something above any and why wouldn't that be the type of thing that is amendment more appropriately made by the Legislature.

MR. GRAMS: I think it's appropriate for both the Legislature and the Judicial branches of government to consider making changes to help the judicial system operate more smoothly. It certain is something that could be addressed by the Michigan Legislature.

JUSTICE TAYLOR: Is there any effort underway along those lines?

MR. GRAMS: In Michigan no. There was in Ohio last year, successful in Ohio. That was part of my responsibility. Texas, we came very close in Texas. It's very difficult to do quite frankly.

JUSTICE YOUNG: I really have no idea why this isn't arguably a change of the current rules of how you plead and prove a case that would be susceptible perhaps to our substantive jurisdiction on what a common law cause of action is but is not subject to our practice and procedure authority.

MR. GRAMS: I know that Mr. Krause, if I could defer to him on this issue, Justice Young, because I have not studied Michigan procedure.

JUSTICE MARKMAN: Mr. Grams, you indicate this is a national problem. Is there any extent to which this is a zero sum game and in which by creating an inactive docket we would disadvantage Michigan citizens in any respect in comparison with the citizens of other states.

MR. GRAMS: No, I don't believe so, not at all Your Honor because we're not talking about disadvantaging Michigan citizens who are truly impaired. That is not the purpose of the petition, not at all.

JUSTICE TAYLOR: Let me just make the example, if I could. If you have people in 49 states who are able to secure compensation if they have damages below X level, but in Michigan below X level you can't, why would that not be a relative disadvantage for Michigan litigants.

MR. GRAMS: The issue is whether someone should be compensated without any damages. That's really what we're talking about.

JUSTICE TAYLOR: But I thought that the whole theory here was that there is some threshold level of damages below which you will not go on the active docket.

MR. GRAMS: Well if you take the unimpaired versus the impaired--let's set aside cancer for example.

JUSTICE TAYLOR: Talk about the guy, there was an argument here this morning about the fellow who can't mow his lawn anymore. Let's say he would fall below the threshold.

MR. GRAMS: I respectfully suggest, Justice Taylor, that if the fellow cannot mow his lawn because of asbestos exposure, that that person would be considered to be impaired, he would have his day in court.

JUSTICE TAYLOR: Is there some category of people who would have what those trained in our law would historically think of as damages but yet would not be able to be on an active docket in your understanding.

MR. GRAMS: Not in my understanding.

JUSTICE YOUNG: Well isn't it what we've had with the medical testimony dispute is the ABA standard allows pulmonary functioning that has a cut-off--

JUSTICE CORRIGAN: But if my lungs are scarred because of asbestos exposure even though I don't have pulmonary impairment, I still have experienced damage from that have I not.

MR. GRAMS: I don't see how you have if there is no functional impairment, if it has not changed your life in any way.

JUSTICE TAYLOR: Historically that's been a question of fact, right. Has it impaired your life.

MR. GRAMS: Yes it has been.

JUSTICE TAYLOR: So you're asking us to change that and the question I have is, isn't that the sort of thing that is a substantive change in the law that is more appropriately addressed to the Legislature.

MR. GRAMS: It's actually deferring it. It's not changing or depriving one of a cause of action. It's really deferring it until that person manifests symptoms.

JUSTICE TAYLOR: What if that person never has any further manifestations. They just have that limitation, maybe slight, maybe debatable, but that just plateaus right there. That person would never be able to get recompense would they?

MR. GRAMS: That is true.

JUSTICE YOUNG: If we were in Montcalm County or some thinly populated county, at least in terms of court dockets and a person with these conditions that are not cancerous, they could go get their trial, right. They'd say well I'm injured, I've got the plaque and my life has been diminished in this way to the exposure, defense says no diminishment of functionality and then they get a trial, right?

MR. GRAMS: It would be a much different situation than the current situation that is driven by Wayne County.

JUSTICE YOUNG: I'm just simply saying what we're dealing with is the artifact of a crowded urban docket, not the fact that these cases aren't capable of being tried. The very cases that you put on this special docket could get tried individually and our common law acknowledges that, right?

MR. GRAMS: Yes. It would be a much easier situation--

JUSTICE YOUNG: All right, so what you're proposing then is an alteration of the status quo, at least in terms of the right of a party manifesting slight symptoms after exposure.

MR. GRAMS: Well it's really not manifestations of slight symptoms. The reality of the situation in Michigan though is that the asbestos litigation is driven by Wayne County and that--

JUSTICE YOUNG: I understand. It's a docket problem.

MR. GRAMS: It is a docket problem, yes, but it is a statewide problem as well because it impacts the litigation in other parts of the state as well.

JUSTICE MARKMAN: Mr. Grams, at the beginning of your remarks you indicated that one of the problems is that people who are suffering differently, people who have different symptoms, people who are essentially unalike, are being placed in the same category. I don't understand. This doesn't happen by osmosis. Who places people in categories. Why is the defense bar not working harder to try to make more precise categories, categories that are more consonant with the precise problems being suffered by individual plaintiffs. Why is that so hard to achieve.

MR. GRAMS: I can tell you from my own personal experience and my representation of Ford Motor Company that that is in fact what part of the responsibility that I have now and that I have had in the past as well. I am working in legislative actions around the country, as well as at the national level as well.

JUSTICE WEAVER: But not in Michigan.

MR. GRAMS: Not yet, Your Honor.

JUSTICE CORRIGAN: Thank you counsel. Robert Bunda.

MR. BUNDA: Good morning. My name is Bob Bunda. I'm a trial attorney. I've been asked to appear here on behalf of Liberty Mutual and my client Owens-Illinois. I'm licensed in Ohio and Michigan. I graduated from the University of Michigan law school. I've been involved in asbestos litigation for almost 25 years. I've been asked to address the successful use of inactive dockets by judicial order throughout the country. There are over 19 separate jurisdictions that have done this and the latest of these jurisdictions is in Madison County, Illinois which last Thursday adopted the ABA minimal criteria that you've been asked to consider here today.

JUSTICE CORRIGAN: Mr. Bunda, have you submitted all this in writing to us sir?

MR. BUNDA: Submitted what, the Madison County?

JUSTICE CORRIGAN: What you're saying right now. Is that a written document that the Court--

MR. BUNDA: That is in the materials that have been provided.

JUSTICE CORRIGAN: I haven't seen everything. It's huge.

JUSTICE WEAVER: This is not a voluntary agreement?

MR. BUNDA: No. The Madison County is not. It was opposed by plaintiffs' counsel and the trial judge submitted it. I don't think the Madison County materials are in because it just happened last Thursday.

JUSTICE YOUNG: But all these others are in the file.

JUSTICE CORRIGAN: All 19.

MR. BUNDA: Yes. Now the jurisdictions, including Madison County, also include the federal and state court in Chicago, federal courts in Philadelphia through the MDL, state and federal courts in Hawaii, Maine, Massachusetts, Mississippi

JUSTICE YOUNG: You've heard the suggestion of Mr. Serling that these were all voluntary--

MR. BUNDA: That's absolutely flat out incorrect. I practice in the state of Ohio. In Cleveland that was opposed. That's a mandatory inactive docket. Madison County is mandatory. Baltimore is mandatory, New York City is mandatory, Seattle is mandatory. All of these I know from the orders are mandatory, they are not voluntary. And that is the direction the courts seem to be going.

JUSTICE CORRIGAN: Mr. Bunda, did they adopt the ABA Task Force proposal in these 19 jurisdictions or has the court cut the line somewhere else. In other words the category our cases we're discussing now.

MR. BUNDA: In a lot of these jurisdictions it's not the ABA because it wasn't in effect yet. Madison County obviously has. New York City essentially has adopted the same thing although the ABA wasn't out at the time, the impairment standard under pulmonary function testing is essentially the same. Let me address some of the medical issues. It is incorrect that somebody would not be able to pass the ABA standard but still be short of breath and not able to cut their lawn. That is absolutely not true. The ABA standard brought together medical doctors from both sides, plaintiffs and defendants. They heard all of the testimony and the doctors are in agreement that there is a medical standard by the American Medical Association that shows impairment and that was incorporated into the (inaudible).

JUSTICE CORRIGAN: All right. If there's anything else you'd like to tell us you can submit it in writing. Your 3 minutes is up. Thank you for coming. Mr. Robert Krause.

MR. KRAUSE: Justice, Associate Justices, the issue of whether or not this is substantive change in the law or procedural has in fact been addressed twice. It has been addressed once by the Illinois Court of Appeals on the Cook County order and once by the Ohio appellate court on the Ohio order. Both of those were mandatory orders and in both instances the court has ruled that this is simply an administrative procedure adopted by the trial courts to regularize and control their dockets. And that is what we are asking the Court to do here. We are not asking the Court to abrogate the rights of any of these plaintiffs. We are asking the Court to prioritize with an inactive docket and those

people who are not sick, who Dr. Kvale has described to you may have some indicia of asbestos exposure but have no impairment. There is no interference with their life. Put those folks on an inactive docket so the serious cases can get adjudicated first. We have had over 70 bankruptcies of companies as a result of this litigation. There are going to be more bankruptcies. We need to husband the assets so that people down the road will have money available to compensate them for the serious injuries, the cancer cases, the serious asbestosis cases. But what we are asking the Court to do is not to deprive anybody of their right but to toll the statute of limitations until those folks manifest a serious impairment.

JUSTICE CORRIGAN: One gets the impression from some of the witnesses this morning that if people are relegated to this docket that they're just gone. Their cases are gone. What mechanism are these other courts using to make the case come back as such time as there is a manifestation of the illness.

MR. KRAUSE: The other courts that have adopted this system provide for the filing of a motion to remove the case from the inactive docket and to place it on the active docket. And that would be consistent with a change in their condition where now they have become impaired or now they have developed a cancer. They may file a motion to have the case put on the active docket and assuming they meet the criteria the case would then go immediately onto the active docket and proceed with the other cases that are on the active docket.

JUSTICE CORRIGAN: Mr. Krause your 3 minutes are already up and if there is anything further you may put it in writing, sir. Thank you for coming. Mary Ellen Gurewitz.

MS. GUREWITZ: Good morning. Mary Ellen Gurewitz of Sacks Logman appearing on behalf of the Michigan AFL-CIO. The AFL-CIO represents the interests of approximately 600,000 union members in Michigan and the national AFL-CIO similarly represents the interests of millions of working people in this country. The question has been raised, both with regard to this issue and with regard to some of the other things the Court was considering today, why isn't this a legislative matter, why are you here in front of the Court. And what I'm here to tell you is that this is a legislative matter. The AFL-CIO has been actively involved at the national level in seeking the creation of a compensation fund for asbestos injury victims. The AFL-CIO has adopted principles to guide its advocacy, principles of appropriate asbestos compensation and maybe I shouldn't say it to all of the litigants in the room but one of the principles is that they want to see more of the money going to the victims and less of the money going to the litigators so that what they have really been advocating is a national compensation fund.

JUSTICE CORRIGAN: Did the AFL-CIO participate in President Archer's task force in any way.

MS. GUREWITZ: I do not know. I cannot tell you that. But I can tell you that the AFL-CIO has been participating with all of the stakeholders, with corporations, with many others at the national level to try to come up with legislation which will establish this compensation fund. Those efforts are continuing as we speak. Senator Bill Frisk, the Senate Majority Leader, has indicated that he wants to take up asbestos litigation in March. Whether or not they're ready at that point, whether or not there are agreements I don't know. But the point is this is a legislative matter. I would refer you to the Petitioners' brief. They said the ABA report is directed to the United States Congress with a plea for intervention. And they further said in their brief although the asbestos litigation crisis has received a good deal of attention in Congress of late, it is questionable whether there will be federal legislation addressing the problem any time soon.

JUSTICE CORRIGAN: Did the AFL-CIO participate in these other 19 jurisdictions that created the inactive dockets in those jurisdictions.

MS. GUREWITZ: I do not know. I suspect that it did not because the AFL-CIO's role is advocacy at the legislative level. We don't usually--

JUSTICE YOUNG: Could you address your remarks to why this proposal would be an invocation of legislative rather than judicial power.

MS. GUREWITZ: Why I think it would be legislative rather than judicial?

JUSTICE YOUNG: Yeah, other than the fact that the ABA proposal is directed to Congress, what is our specific limitation of our authority at.

MS. GUREWITZ: Your specific limitation is that this Court under the Michigan Constitution is limited to acting on matters of practice and procedure. And this Court has repeatedly recognized that that separation of powers is one that has to be respected.

JUSTICE YOUNG: Why would this not be procedural is what I'm asking.

MS. GUREWITZ: It would not be procedural for the very reason that the lines have to be drawn. You have all been grappling with the question of who gets to go to court and who doesn't. Who gets put on the inactive docket and who doesn't. What is impairment and what isn't. What is asbestosis. There are all of these very complicated issues which are very fact sensitive. There are also a lot of fact questions you will notice about whether there is even any crisis. Where cases are, how difficult are they to deal with in all of the jurisdictions in this state. Those are questions that need to be answered by fact gathering which this Court is very ill-suited for. And also I think the Court has said in numerous cases that line drawing is that particular exercise of a public policy choice that legislatures are suited for and that judges are not suited for.

JUSTICE CORRIGAN: Thank you Ms. Gurewitz, your time is up. Three minutes goes by fast. Thank you for coming. Linda Teeter.

MS. TEETER: Good morning, Madam Chief Justice, Associate Justices, my name is Linda Teeter. I'm the director of Michigan Citizen Action and I rise to ask this Honorable Court to protect Michigan's citizen rights to legal action based on harm caused by their exposure to asbestos. I ask the Court to reject this petition which asks you to take writing of the law in your own hands and establish a statewide inactive asbestos docketing system. And I do have some written comments, you've heard much this morning so I want to deviate for a minute and address a question that Justice Taylor asked about would this create an uneven playing field. Right now in Washington there are two bills, Senate Bill 274 and Senate Bill 1125. I'd be glad to get you copies of those. They deal with asbestos. It deals with a trust fund and I do believe that it would create an uneven playing field because if the trust fund is set up and other states and victims are drawing from that, then people in Michigan are not going to have the opportunity to do that until this criteria does come effect for their own medical criteria. So I would like to get you copies of those.

JUSTICE TAYLOR: I'm not sure I understand what you just said. If they set up a trust fund and if this Court had set up the inactive docket, those on the inactive docket would not be participatory in the trust fund, is that the idea.

MS. TEETER: Until--other people would be drawing from it because companies would be putting dollars into that and that would be the only pool of funds that there would be--

JUSTICE TAYLOR: And you have to be on an active docket to do that, is that right?

MS. TEETER: Right, to draw from that. So I believe that it does create an uneven playing field for people who are, as you've heard today, have been exposed to asbestos.

JUSTICE CORRIGAN: What's happening in these other 19 jurisdictions where they've created those dockets then.

MS. TEETER: I'm not familiar with that. I'm not qualified to answer that. I do want to say too that we do believe the petitioners have chosen the wrong venue for this request, that it is a legislative request and a venue for the Legislature and I am joined today by Steven Goules who is the Michigan State Director from AARP and also Rose Adams who is the CEO of the American Lung Association of Michigan. We have all had our counsels who have filed briefs that you have on record and until this morning are most familiar with the legislative session and advocating before the Legislature with our elected officials about these sort of issues. Thank you for your time.

JUSTICE CORRIGAN: Thank you for joining us this morning. Mary Brown. Is she here? [no show]. Professor Robert Filiatrault.

PROFESSOR FILIATRAULT: Madam Chief Justice, other Justices of the Court, please excuse my throat, I'm suffering a little myself today. I think what we're dealing with here is tort reform trying to take the form of a court rule. We are asking if this kind of docket is adopted by court rule or administrative order to require a plaintiff to prove his case twice. You have to prove it once just to be put on the docket and then he would have to prove it again, if it could not be settled, before the fact finder. I cannot think of a clearer example of tampering with substantive law. What this Court can do by way of marriaging existing dockets is certainly, we can talk in terms of the housekeeping rules of the rules of civil procedure but when we take plaintiffs and we're talking about serious plaintiffs and not so serious plaintiffs. I know when I was in practice I know I could not have told any of my clients that they weren't a serious plaintiff and to put additional impediments to getting their day in court I think once again is tort reform taking the form of a court rule. And I think that is, to a certain extent, been made manifest by the questioning of varying witnesses when we're looking at well what's the plateau for this, what's the plateau for that. If there is a need for tort reform, I do not think it should be debated in the name of procedure. But rather should be debated before a Legislature which has hearings, staff, research sources, can have open hearings before it ultimately makes a decision as to whether or not a given area of tort ought to be reformed. And I think as I say that the questions that have been asked by varying witnesses bespeak that. Let me add one other thing. Judge Corrigan, I noticed with interest earlier in the session when a woman came forward and asked whether or not there ought to be a registration for spousal abusers. And I think you wisely told that individual no, go see your Legislature, we really shouldn't be doing that. Well isn't what we are being asked here today, it's not a special docket, it's a register where the little guys go, unless those little guys can convince a judge that they have reached a threshold to which the Legislature has never spoken and then assuming they can get on the docket they have to prove their case again. I don't think that's for court rules. I don't think that's what administrative orders are designed to accomplish. Thank you.

JUSTICE CORRIGAN: Thank you professor, and thank everyone for coming to our public hearing this morning. We appreciate your input very much. We will consider this item and other items on our public hearing agenda very carefully. This Court is adjourned.